requiring the pioneers to pay for their licenses in the absence of a specific statutory grant of authority.

B. The Commission's Interpretation of Section 4(i) Oversteps Its Limits.

The cases interpreting section 4(i) demonstrate that it was never intended singlehandedly to confer authority on the Commission to condition the award of a license on the payment of fees of the magnitude contemplated by the Commission. "Section 4(i) is not infinitely elastic." North American Telecommunications Ass'n v. FCC, 772 F.2d 1282, 1292 (D.C. Cir. 1985). As the Commission acknowledged in the Mtel Decision at 21, it "permits the functioning of the Commission in unforeseen circumstances in areas clearly within [the Commission's] general authority." In re Applications of KDAB, Inc. and Ben Lomond, Broadcasting Co., 91 FCC 2d 277, 284 (1982) (emphasis added).

In this regard, the D.C. Circuit's similar interpretation of section 16 of the Natural Gas Act, 15 U.S.C. § 7170, which contains the Federal Power Commission's "necessary and proper clause," is relevant.[26/] Thus, in Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973), the court explained that section 16

26/ Like section 4(i), this section provides:

> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."

15 U.S.C. § 7170.

"cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined." Id. at 1257. The Mobil court continued: "Congress did not give the FPC carte blanche to take whatever action it might consider appropriate in furtherance of the objectives of the Act." Id. at 1248 (quotations omitted). In another case, the court made it clear that section 16 is "of an implementary rather than substantive character. . . . [It] merely augment[s] existing powers conferred upon the agency by Congress, [it] do[es] not confer independent authority to act." New England Power Co. v. FPC, 467 F.2d 425, 430-31 (D.C. Cir. 1972), aff'd, 415 U.S. 345 (1974). These cases, which require that any order or regulation must derive its authority from another section of the enabling statute, support a narrower interpretation of section 4(i) than the Commission advocates in the Mtel Decision.

The four cases on which the Commission relies in support of its contention that section 4(i) gives it the requisite authority to impose a fee requirement, Mtel Decision at 19-20, are readily distinguishable from this case. Significantly, they all involve the regulation of the telephone industry and, therefore, the delicate balance between the Commission's duty to protect the rights of ratepayers without infringing on the rights of the shareholders of common carriers. In each of these instances, it was clear that the Commission already had express authority under the rate regulation provisions of the Act to regulate in the general area of ratemaking and was using its section 4(i) authority merely to fill in the interstices of that general authority. In addition, the measures adopted by the Commission in those cases were remedial, rather than the unprecedented substantive imposition of a requirement that a preference holder pay potentially hundreds of millions of dollars for its license as suggested by the Remand Motion and the Mtel Decision.

For example, Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975) concerned the Commission's general authority to regulate AT&T's rates under section 205 of the Act. In Nader, the Commission had gone one step beyond prescribing rates and had prescribed a rate of return. In affirming the Commission, the D.C. Circuit reasoned that under section 205 the Commission has the authority to prescribe rates and that authority necessarily must include the authority to prescribe elements that make up the charge, such as the rates of return. The court then concluded that the authority of section 205 is "enhanced" by section 4(i), which gives the Commission the power to issue an order necessary to "carry out its functions in an expeditious manner." 520 F.2d at 204.

Similarly, in Lincoln Tel. & Tel. v. FCC, 659 F.2d 1092 (D.C. Cir. 1981), the D.C. Circuit allowed the Commission under section 4(i) to set interim charges for interconnection provided by Lincoln Tel. & Tel. ("LT&T") to MCI. The Commission previously had concluded that it was in the public interest for LT&T to provide MCI with local interconnection, but LT&T and MCI were unable to agree on rates for the interconnection. The Commission ordered the parties to "bill and collect the charges that are set forth in the tariff filed by the Bell System

Operating Companies," subject to later adjustment when "just and reasonable" rates could be agreed upon. 659 F.2d at 1107.

In response to LT&T's challenge to the Commission's order, the court held that the "establishment of an interim billing and collection arrangement was both a helpful and a necessary step for the Commission to take in implementing its 'immediate' interconnection order." Id. at 1108. Moreover, the court found it ironic that LT&T would challenge this part of the order since the interim billing arrangement worked to LT&T's advantage. The Commission could have ordered immediate interconnection without the interim billing arrangement, thereby requiring LT&T to provide MCI with free interconnection until a billing arrangement could be agreed upon. Id. at 1108 n.77.

North American Telecommunications Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985), involved orders of the Commission imposing certain conditions on the BOCs before they could re-enter the customer premises equipment business. One of these conditions required the BOCs to submit plans of capitalization to the Commission. The D.C. Circuit held that section 4(i) provided the Commission with the authority to require the submission of capitalization plans, stating that "[t]he power asserted here is less far-reaching than the power the Commission has been allowed to exercise under its implied 'ancillary jurisdiction' to regulate services such as cable television that impinge on the services over which it has explicit statutory jurisdiction." 772 F.2d at 1292-93. The court held that it was necessary for the Commission to require the submission of the BOC's capitalization plans to ensure that the equipment subsidiaries were not undercapitalized and were not being subsidized by the telephone subsidiary in violation of the separate-subsidiary order. Id. at 1293.

Finally, New England Tel. & Tel. Co. v. FCC, involved a finding by the Commission pursuant to section 205 that AT&T's excessive earnings in 1978 violated the agency's outstanding rate-of-return prescription. 826 F.2d 1101, 1109 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989). As a result of this finding, the Commission under section 4(i) directed AT&T to remedy this violation by prospectively reducing the amount of its excess earnings. The D.C. Circuit concluded that the Commission had authority to order this remedy under section 4(i), because "[i]n a strictly technical sense, the Commission's choice of remedy was absolutely necessary; without the reductions, the carriers in fact would not be limited to a return of 10% and the prescription would be violated." Id. at 1107-08.[27/]

Here, rather than merely filling in the gaps of its express statutory authority, the Commission is attempting to use section 4(i) on its own to do what the Commission has never done before -- to require licensees to pay for the

27/ The Commission ignores the final decision in the series of rate of return cases -- American Tel. & Tel. Co. v. FCC, 836 F.2d 1386 (D.C. Cir. 1988) -- in which the D.C. Circuit limited its holding in New England Tel. & Tel. Company. Specifically, the court held that the Commission did not have authority under section 4(i) to promulgate rules requiring any carrier earning an excessive rate of return to refund the excess without an individual finding that a carrier overearned. Id. at 1390-92. In other words, the court restricted the Commission's power to promulgate generically applicable rules under section 4(i), which is what the Commission is apparently attempting to do here.

spectrum for which they receive a license. Recently enacted section 309(j) of the Act authorizes the Commission to receive payment for a license only in the context of an auction. As the Commission has conceded, the pioneers, by virtue of not being mutually exclusive applicants for a PCS license, are not subject to section 309(j) auction authority. Mtel Decision at 17.

C. The Payment of Fees by PCS Preference Holders Is Unrelated to "Necessary" Commission Functions.

Aside from the fact that the Commission is attempting improperly to use section 4(i) as a free-standing source of statutory authority, the Commission has failed to satisfy the express requirements of that provision. In the Mtel Decision at 18-23, the Commission asserted that section 4(i) authorizes it to impose fees on pioneers for their licenses because such fees are "necessary in the execution of its functions." This assertion, however, is wholly unsupported by the record.

The two-fold premise of the Commission's position is that imposition of such fees is "necessary" to promote competition in the PCS licensing context, and to implement a rational, fair system of competitive bidding. Mtel Decision at 21-22. While these are both legitimate interests, there is no evidence that the action proposed -- the requirement that the pioneers pay for their licenses -- is necessary to further these interests.

The Commission's argument is fundamentally flawed at the outset because, as discussed above and in APC's Supplemental Comments on Remand, there is no evidentiary support for the Commission's underlying premise that, without conditioning the award of a license to the PCS pioneers on the payment of substantial fees, the entities who are required to bid on the remaining licenses in the preference markets will be competitively disadvantaged. In fact, contrary to the Commission's speculation, market analysts have predicted that the remaining licenses in the markets in which a preference will be awarded will be auctioned off at a premium, thereby disproving any suggestion that the preference will create a competitive disadvantage among PCS providers or will distort the auction process to the detriment of the Treasury's coffers.

Moreover, the Commission has taken no evidence regarding and made no findings of actual competitive disadvantage that would inure to PacBell if Cox were to receive its license for "free." The Commission has simply speculated that it is disadvantageous for one licensee to get its license for free while the other must bid for its license at auction.[28/]

28/ Earlier in this proceeding, the Commission conducted some fact finding with regard to the competitive impact of allowing in-region cellular providers to obtain PCS licenses. The Commission, after soliciting and receiving comments, determined to prohibit cellular operators from operating PCS systems in areas where they provide cellular service because of the concern expressed by many commenters about the potential for unfair competition. See In the Matter of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, GEN Docket No. 90-314, 8 FCC Rcd 7700, 7744 (1993). After considering all the facts and circumstances, however, the Commission found that where a cellular service area covers less than 10 percent of the population of a PCS service area, "the potential for exercise of undue market power by the cellular operator is slight." Id. at 7745. Therefore, the Commission limited the ownership restriction to areas where the overlap area exceeds 10 percent of the PCS area's population. Id. In other words, the Commission analyzed the market and the anticompetitive effects and crafted a remedy tailored to those effects.

In addition, even if the Commission had substantiated this hypothetical harm, its action would still fail to satisfy the requirements of section 4(i) because the Commission has made no showing that the "remedy" proposed is "necessary." See New England Tel. & Tel. Co., 826 F.2d at 1108-09 (rate reduction "necessary" to prevent violation of rate of return prescription). There has been no determination based on the particular characteristics of each preference market of the amount of fees that would be necessary to remedy the hypothetical competitive disadvantage. Indeed, in the Mtel Decision, the Commission simply pulled an arbitrary figure (the lesser of 90% of the lowest winning bid or $3,000,000 less than the lowest winning bid) out of the air. Mtel Decision at 16.

There has been no fact finding by the Commission with regard to the amount of any payment for the broadband PCS pioneers. Therefore, the Commission cannot demonstrate that any particular amount is "necessary" to execute its functions. For these reasons, the Commission's reliance on section 4(i) as a basis to condition the grant of broadband PCS pioneer preference licenses on some payment will not withstand judicial scrutiny.

III. CONCLUSION

The Commission has taken an extraordinary step in this case of requesting remand with the stated intent of imposing payment conditions on the PCS pioneers. Adopting so major a change in position without fully considering the impact of the Commission's newly announced policy of "competitive implications" would be foolhardy. Examination of the policy in any detail reveals its fatal deficiencies in logic, law and practice.

Respectfully submitted,

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Pacific Bell In Cellular Strategy

By ANDREA ADELSON

Special to The New York Times

LOS ANGELES, July 15 — Pacific Bell said today that it hoped to begin building a customer base for a new wireless service by seeking regulatory approval to resell cellular phone service from other companies.

The new service is to be provided by Pacific Bell Mobile Services, a subsidiary formed by the regional Bell company expressly to provide wireless communications service.

The strategy of pushing the new business into cellular operations is a "brilliant idea," said Frank J. Governeli, a telecommunications analyst for the CS First Boston Corporation. It will permit Pacific Bell Mobile Services "to jump start" a business that will become operational in 1997 and cost about $2 billion to develop, he said.

Analysts said they expected Pacific Bell, whose parent is the Pacific Telesis Group, to outspend all its rivals to win several licenses to be auctioned for both Northern and Southern California by the Federal Communications Commission for new wireless frequencies.

Last April, in preparation for the auction, Pacific Bell spun off to shareholders its own cellular telephone business from its core local telephone operations. Because every other Bell company also has cellular operations, this made Pacific Bell eligible to compete for licenses considered to be the most potentially lucrative — those that cover a higher-capacity portion of the frequency spectrum and are in the local phone company's home territory.

The new frequencies are to be used for personal communications services, which some analysts say could become a $40-billion-a-year business. The service is a digital technology that operates at a higher frequency and lower power than standard cellular telephone service.

The new service, as envisioned by Pacific Bell, will permit customers who obtain digital phones to use a single telephone number for an array of uses, including paging and data transmission.

The plan by Pacific Bell to rebuild its cellular customer base in anticipation of winning the F.C.C. license "is a very intentional signal meant to intimidate" potential competitors, said William Deatherage, an analyst with S. G. Warburg & Company.

Other bidders are likely to include AT&T, cable companies and other regional Bell companies. He estimated that licenses would cost about $20 a person, or about $414 million for Southern California and $262 million for Northern California.

Pacific Bell can outbid any competitor for the new licenses and remain competitive because its nine million California customers and huge infrastructure will provide significant cost advantages, Mr. Governeli of CS First Boston said.

CERTIFICATE OF SERVICE

I, Pamela M. DuBost, hereby certify that today on this 29th day of July, 1994, I caused a copy of COMMENTS OF COX ENTERPRISES, INC. ON AMERICAN PERSONAL COMMUNICATIONS EMERGENCY REQUEST FOR ORAL ARGUMENT to be served by first-class mail, postage prepaid to the following:

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